

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jeremy David Asher,

Case No. 19-cv-3002 (WMW/KMM)

Plaintiff,

v.

**ORDER ADOPTING REPORT AND
RECOMMENDATION AS MODIFIED**

Brian Ninneman et al.,

Defendants.

This matter is before the Court on the July 29, 2020 Report and Recommendation (R&R) of United States Magistrate Judge Katherine M. Menendez. (Dkt. 35.) Plaintiff Jeremy David Asher is civilly committed to the Minnesota Sex Offender Program (MSOP) and lives at MSOP's facility. Asher commenced this action against eight MSOP employees based on Asher's brief placement in a high-security area and corresponding unclothed visual body search following Asher's refusal to comply with directives from MSOP staff. Asher asserts claims against Defendants, in both their official and individual capacities, for violations of Asher's Fourth, Eighth, and Fourteenth Amendment rights under the United States Constitution.

The R&R recommends dismissing Asher's claims against the Defendants in their respective official capacities for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The R&R also recommends dismissing the remainder of Asher's claims for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). No objections to the R&R have been filed. In the absence of timely objections, this Court

reviews an R&R for clear error. *See* Fed. R. Civ. P. 72(b); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (per curiam). Having performed this review, the Court adopts the R&R as modified.

The R&R recommends dismissing Asher's complaint with prejudice. Although Rule 12(b)(6) dismissals are commonly with prejudice, *Vigeant v. Meek*, 352 F. Supp. 3d 890, 900 (D. Minn. 2018), claims dismissed for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) are "necessarily dismissed without prejudice," *Hussein v. Barr*, No. 19-cv-292 (JRT/HB), 2019 WL 5150039, at *3 (D. Minn. July 31, 2019); *see also Hart v. United States*, 630 F.3d 1085, 1091 (8th Cir. 2011) (affirming dismissal for lack of subject-matter jurisdiction but modifying the dismissal to be without prejudice).

Based on the R&R, the foregoing analysis and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that the July 29, 2020 R&R, (Dkt. 35), is **ADOPTED AS MODIFIED** as follows:

1. Defendants' Motions to Dismiss (Dkts. 16, 29), are **GRANTED**.
2. All claims brought by Plaintiff Jeremy David Asher against Defendants in their respective official capacities are **DISMISSED WITHOUT PREJUDICE**.
3. All other claims are **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 15, 2020

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge